

Letters of Findings: 04-20130337; 04-20130338; 04-20130340
Sales and Use Tax
For the Years 2009, 2010, and 2011

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-7-3; IC § 6-2.5-8-8; IC § 6-8.1-3-12; IC § 6-8.1-5-1; [45 IAC 2.2-7-3](#); [45 IAC 2.2-8-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012).

Taxpayers protest the assessments of sales tax on diesel fuel sold at their truck stops.

STATEMENT OF FACTS

Taxpayers are Indiana companies, which operate several truck stops in Indiana. Taxpayers sell tangible personal property and fuel at their truck stops. In 2012, the Indiana Department of Revenue ("Department") audited these truck stops for the tax years 2009, 2010, and 2011. Both Taxpayers and the Department agreed to use the agreed sample transactions (from Taxpayers' business records at one of the three truck stops) that occurred during 2009, 2010, and 2011, to project the audit result.

Pursuant to the audit, the Department determined that Taxpayers sold certain tangible personal property and fuel without collecting sales tax or exemption certificates from customers who claimed that they were exempt from the sales tax. The Department's audit also determined that Taxpayers purchased certain tangible personal property to be used in the course of its business without paying sales tax or use tax. As a result, the Department assessed additional sales and use tax, penalty, and interest.

Taxpayers only protested the assessments of sales tax on the sales of diesel fuel at three truck stops. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition.

DISCUSSION

The Department's audit imposed additional sales tax on the ground that Taxpayers failed to collect and remit sales tax on the diesel fuel sold at their three truck stops. Taxpayers, to the contrary, claimed that more than 94 percent of the diesel fuel sales at the three truck stops were exempt and thus the audit's assessments were overstated. Specifically, Taxpayers claimed that, after the audit, they conducted their own sampling projection and concluded that 96.07 percent, 96.84 percent, and 94.2 percent of its diesel fuel sales at the three truck stops were exempt by using the exemption certificates they obtained from their customers for the transactions occurred during January 1, and through May 31, 2013. Taxpayers further referred to a study which they conducted in August 2013 at all three truck stops to reiterate the similar assertion (the "August 2013 study").

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012).

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-4-1, in pertinent part, states:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

IC § 6-2.5-7-3 provides:

(a) With respect to the sale of gasoline which is dispensed from a metered pump, a retail merchant shall collect, for each unit of gasoline sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:

- (1) the price per unit before the addition of state and federal taxes; multiplied by
- (2) seven percent (7 [percent]).

The retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#).

(b) **With respect to the sale of special fuel or kerosene which is dispensed from a metered pump, unless the purchaser provides an exemption certificate in accordance with [IC 6-2.5-8-8](#), a retail merchant shall collect, for each unit of special fuel or kerosene sold, state gross retail tax** in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:

- (1) the price per unit before the addition of state and federal taxes; multiplied by
- (2) seven percent (7 [percent]).

Unless the exemption certificate is provided, the retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#). (**Emphasis added**).

IC § 6-2.5-8-8 states:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(b) The following are the only persons authorized to issue exemption certificates:

- (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
- (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and
- (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

(c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.

(d) A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:

- (1) a fully completed exemption certificate; or
- (2) the relevant data to complete the exemption certificate;

within ninety (90) days after the sale.

(e) If a seller has accepted an incomplete exemption certificate under subsection (a) and the department requests that the seller substantiate the exemption, within one hundred twenty (120) days after the department makes the request the seller shall:

- (1) obtain a fully completed exemption certificate; or
- (2) prove by other means that the transaction was not subject to state gross retail or use tax.

IC § 6-8.1-3-12(b) further provides:

The department may audit any returns with respect to the listed taxes **using statistical sampling. If the taxpayer and the department agree to a sampling method to be used, the sampling method is binding on the taxpayer and the department in determining the total amount of additional tax due** or amounts to be refunded. (**Emphasis added**).

Accordingly, Taxpayers, as retail merchants selling the diesel fuel, are responsible for collecting and remitting the sales tax on the sales of fuel unless their customers provide fully completed exemption certificates or information to substantiate the transactions are exempt. When Taxpayers and the Department agree to a sampling method to be used, the sampling method is binding on both Taxpayers and the Department in determining the audit result.

In this instance, Taxpayers asserted that the audit's assessments were overstated; they relied on a post-audit sampling method, using the exemption certificates they obtained from their customers for sales occurred during January 1 and through May 31, 2013, and the August 2013 study.

Upon reviewing Taxpayers' supporting documentation, their reliance on the post-audit sampling result and the August 2013 study is misplaced. First, as discussed earlier, both Taxpayers and the Department agreed to use statistical sampling, based on Taxpayers' 2009, 2010, and 2011 records, to determine the audit result. Thus, both Taxpayers and the Department are bound by the agreement and the result. During the audit, the Department allowed Taxpayers reasonable time to submit additional documentation, including the required exemption certificates, to support their assertion that some customers were exempt from sales tax. However, Taxpayers did not do so. Rather, Taxpayers referred to their 2013 records which are outside the agreed sampling period. Thus,

the Department is not able to agree that Taxpayers met their burden.

Pursuant to [45 IAC 2.2-8-12](#)(b), "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." [45 IAC 2.2-8-12](#)(d) also cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important for the seller to obtain an exemption certificate in order to avoid the necessity for such proof." In the absence of the properly signed and executed exemption certificates, the Department's audit properly assessed sales tax on the otherwise taxable sales.

Taxpayers are reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained at the time the transaction occurs; otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayers met their burden of proof to demonstrate that the proposed assessment is wrong.

FINDING

Taxpayers' protest is respectfully denied.

Posted: 11/27/2013 by Legislative Services Agency
An [html](#) version of this document.